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OPINION

Vol. 2—No. 5

APRIL 30, 1951

Efficacy of the Jury System

The Jury System As Seen By An Appellate Judge

By CHARLES S. DESMOND
Associate Judge, N. Y. State Court of Appeals

Editorial Note: This is the last of the articles on the efficacy of the jury system. The subject has been covered in previous issues from the personal viewpoint of a juror, a trial lawyer, a psychologist, and a sociologist.

The author received his A.B. from Canisius College, 1917, and his A.M., 1918; also an LL.B. from the University of Buffalo, 1920. He is the author of "Sharp Quilllets of the Law," 1949. He is a member of the New York State Supreme Court, 1940, and was elected associate judge, Court of Appeals, State of New York, for the term 1941-1954.

A Judge of the New York Court of Appeals, constrained by Constitution and Statute to inspect jury verdicts as to legality only, is officially ignorant in respect to their fairness or reasonableness. But we do read (literally) thousands of records of jury trials, and we remember earlier tours of duty as lawyers and trial judges. Out of that amalgam of experience come the impressions here set down.

Effect of a Juror's Background

The jury is a truly democratic institution—Jefferson said that "trial by Juries impartially selected" was one of the principles forming the bright constellation which guided the steps of an infant America. The jury system brings into the courtroom the men and women who own and pay for and control the government, lets them take part in, and scrutinize the workings of, their judicial system. But the jurors bring with them their human foibles and cantankerousness, too. Shakespeare, who had his eloquent say on almost everything, remarked that:

"The jury, passing on the prisoner's life,
May in the sworn twelve
have a thief or two,
Guiltier than him they try."

Since the aberrations of juries make better telling than the good jobs they do, the former are the more celebrated. Everyone knows the stories: the juror who (in a case where a unanimous verdict was required) remarked on the stubbornness of his eleven associates; the juror who, putting what he thought was a very low figure on his slip of paper in an effort to bring down the resulting average, found that his guess was the highest of all. Likewise, the jurors who are interested mainly in free meals at the county's expense, seem to have been with us throughout the two centuries since Pope wrote: "and wretches hang that jurymen may dine" (the preceding line's reference to "hungry judges" stricken out as scandalous and irrelevant). I had my own experience, in the

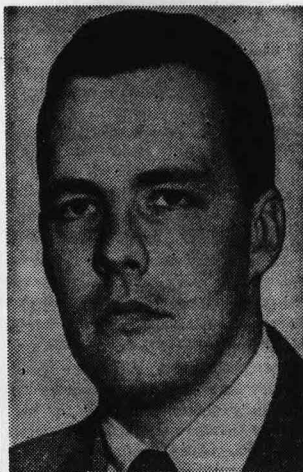
Law Review Elects New Editorial Board

The Law Review wishes to announce the election of Alvin M. Glick as Editor-in-Chief and Tom Kelly, John Wick, Morree Levine and Sam Misrendeno as Associate Editors. Miss Phyllis Hubbard and Miss Mary Davey comprise the remainder of the Editorial Board. Tentative candidates for next year will be chosen from the following list of Juniors and Freshman: Juniors—Jack Gruber, Spero Yanilos, David Mahoney, John Krull, John McKee and James Sherman; Freshmen—Robert Blaney, Hilary Bradford, Neil Formelo, Ralph Halpern, Sheldon Hurwitz, Emil Kratzer, Maynard Schaus, Joseph Taddio, Robert Thompson, and Joseph Tisdall. The total number of Freshmen will ultimately be expanded to fifteen. In order for those already named to remain candidates they must maintain a satisfactory academic standing.

The first volume of the University of Buffalo Law Review has been completed and will be published and distributed in the very near future. The first issue shall contain an interesting article on *res ipsa loquitur* by Professor Louis L. Jaffe, Byrne Professor of Law at Harvard Law School, a former dean of this school. In addition there will be eighteen student notes and comments dealing with recent cases in the courts, with emphasis on New York law. The issue shall also contain eight book reviews by members of the judiciary, bar, and faculty.

This is a queer world. While the so-called civilized people prepare for war, the savages are at peace.

Senior Honored



ROBERT FLEMING

Bob Fleming Receives Research Scholarship

The University of Buffalo Law School may well be proud of Robert Fleming who was recently appointed to research assistantship in Patent Policies and Practices at the University of Wisconsin. The work is to be integrated with that of the Agricultural School.

This type of an appointment is only bestowed on those who show an exacting ability and drive. The recipients are selected after an extensive screening process which weighs students from all the major law schools in the country.

Bob is particularly qualified for this honor not only because he possesses a degree in engineering from the University of Minnesota, but also by his background and qualities as evinced by his student activities here. He stood as one of the top men in his Freshman and Junior classes receiving the Box Scholarship, the Adelbert Moot Scholarship, and the Clinton Scholarship.

For the past three years Bob has been a member of the student council and is presently the president of this organization. In addition to the other activities he has been concerned with, Bob is Editor-in-Chief of the newly formed Buffalo Law Review. Recently, in recognition of his endeavors, he was elected to the Bisonhead, further evidence of the respect that he has earned here.

Not everyone can do great things—the secret is to do small things in a great way.

Conference On Civil Liberties Held On Campus

On the afternoon and evening of Friday, April 20, 1951, a conference on Civil Liberties was held in the student union at the University of Buffalo. The program was divided into the opening plenary session at 1:45, where the keynote address was delivered by the Honorable Charles S. Desmond, Associate Judge, New York Court of Appeals. Following this, at 2:30 and 4:15 a series of six panel discussions were held which included such prominent men as Mr. Samuel P. Capen, and Mr. Barton Bean, who discussed the role of academic freedom in democracy. The panel on the legislator's role in protecting civil liberties brought together Mr. Justin C. Morgan, chairman of the judiciary committee of the New York State Assembly, and Mr. David Diamond, former justice, New York Supreme Court. Other speakers included John E. Leach, president of the Erie County Bar Association and attorney Jay T. Barnsdall Jr., who spoke on police protection versus civil liberties.

The panel on labor brought together Edward F. Gray, regional director of U A W-C I O, and Joseph Shister, chairman, Dept. of Industrial Relations at U. B. Clarence M. Maloney, former New York Assistant Attorney General and Charles P. Livermore, executive director, Board of Community Relations who discussed minority groups. Covering the religious field were William Thomas Heath, Rector of Trinity Church and Robert Brill, Director of social services, Buffalo Council of Churches.

The evening session, beginning at 8:00 o'clock, brought the prominent and colorful attorney of the American Civil Liberties Union, Mr. Arthur Garfield Hays. Mr. Jacob Hyman, chairman of the Erie County Civil Liberties Committee made the introductions.

Ain't It The Truth?

Climbing to success over the misfortunes of one's fellowmen is a slippery ladder with many broken rungs.

There never was a sermon yet that beat a good example.

JURY SYSTEM

(Continued on Page Four)

OPINION

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Legum Cupidae Inventuti

Vol. 2—No. 5 APRIL 30, 1951

EDITORIAL

Hail and Farewell

We of the new Opinion staff wish to extend our farewells to the old staff. Under their guidance and labor a new tradition has been born at the UB Law School. We can only say we hope the tradition will grow with the University.

Action or Words

The Opinion is not interested in personalities; rather it is interested in action. The few who place their interests above the group must by now realize the group is demanding action.

Let us not have eyes and see not, nor ears and hear not. The students and the Opinion want to know what happened to the honor system. The time has come for definite action. A crystallization of the issues and a vote are certainly called for. How about having the student council propose various honor systems and call for a referendum?

The sooner the problem is clarified and the solution voted upon, the sooner the goals of the majority will be satisfied.

From Queen Elections

Occasionally, circumstances provide a basis for a legitimate gripe. The Opinion feels that the unreasonable action of the Board of Elections in the recent balloting for Junior Prom Queen justifies such a gripe. No one has to tell law students that they are members of a larger entity sometimes called the University of Buffalo. Each semester our checks for tuition are made payable to the University. There are times, however, when our uptown cousins seem to forget all are members of the same big happy family. How else can one explain the perfectly assinine insinuations implicit in the rules governing the casting of ballots for Prom Queen? Some-

one on the Board of Elections must have reached the conclusion that all law students were by nature ballot-box-stuffers supreme. Certainly the safeguards attending our casting of ballots were entirely lacking on campus. On campus, the high and mighty voted by flashing Norton Union Cards.

At law school, not only were Norton Union cards of no use, but even sworn affidavits, perfectly proper in courts of law, were sneered at by the ballot collector. Either you had a driver's license or you had a Social Security card, or you didn't vote. Pity the poor soul that had forgotten his identification, or even worse, had never driven a car or worked a day in his life; that unhappy misfit just didn't vote. Can it be that those who would control elections were so sure of their campus ballots that restrictions there were felt unnecessary?

Mock Trials Success

On Tuesday, April 3, four members of Mr. Arens' Evidence class took part in one of a series of mock jury trials designed by Mr. Arens to provide the students with some practical experience. Mr. James Sack acted as presiding judge. The suit, based on the record of an actual case, involved an action for personal injury resulting from an automobile accident. Attorneys for the plaintiff were Herbert T. Shaeffetz and Alfred F. Cohen, Jr., and the defendants in the action were represented separately by Jack Dillon and Michael Lolly. On a motion by Attorney Dillon, Judge Sack dismissed the suit for no cause of action with respect to the first defendant. Mr. Lolly's client was awarded the jury verdict by a vote of 11-1.

The last of these mock trials took place on Tuesday, April 17, with Mr. Arens presiding. Tom McMahon and Eugene Burke for the proponents opposed Mike Beilewech and Ed Kinney, in a suit involving testamentary capacity. The jury found unanimously for the proponents.

Lawyers Club Fetes

U. B. Law Seniors

Members of the Senior Class were guests at a cocktail party and reception in the Bar Association headquarters given April 23 by the Lawyers Club of Buffalo. William R. Brennan, chairman of the club's membership committee introduced John H. Dittman, president of the Club; John E. Leach, president of the Bar Association of Erie County; Raymond T. Miles, president of the Marshall Club, and Miss Ina Alt, president of the Women Counsellors.

Also present were Judge Charles S. Desmond of the Court of Appeals, Justice R. Foster Piper of the Appellate Division and Supreme, County and City Court judges.

BOOK REVIEW

By PHIL TWERSKY

"The Nine Young Men," Wesley McCune, Harper Brothers, 275 pages, 1947—\$3.50.

As law students, all of us are keenly aware of the paramount position that the U. S. Supreme Court occupies at the apex of our judicial system. However, all too many of the American public—layman, law student, and lawyer alike—have come to regard this august body with such awe and reverence that psychologically we have clothed the Court with a judicial halo of sacrosanct knowledge and righteousness that precludes critical evaluation and objective investigation into its workings. Such an attitude is detrimental to the functioning of a dynamic democratic society.

Recently I had the opportunity to read Wesley McCune's book, "The Nine Young Men." In this volume, the author has ripped aside this illusory veil and presented to the reader a picture of the Supreme Court as it really exists.

In a frank, outspoken, sprightly manner, tinged at times with ironic witticism, Author McCune has applied himself diligently to the task of an "objective" evaluation of the Court when it sat during that hectic decade of 1937-1947, a period which witnessed the height of the New Deal and Roosevelt's abortive attempt to "pack" the Court. This critical period he aptly terms as being one of "judicial revolution."

The book is divided into two main categories. The first comprises an evaluation of the workings of our judicial process on this highest level; the legal problems that face the Justices, and the manner in which they resolve them; the force of stare decisis and the pioneering efforts in breaking new judicial ground. Alternating with such legal aspects of the judicial system are chapters giving graphic sketches of the Justices who sat on the bench during this period. These vignettes are highly revealing as to the extent of (or lack of) formal legal education enjoyed by the Justices, their legal experience, prior government service and private practice, their judicial outlook, temperament, and foibles.

One sees at close range the scholarly Frankfurter, fully cognizant of the eye of history on him; the liberal Black who had to expunge himself of the taint of Klanism; the politically wise Byrnes; the ambitious, hard-hitting Jackson. The reader will recognize anew such diverse landmarks as Erie Railroad, Grey v. Powell, the two Williams cases, the Jehovah Witnesses, Bridges, McNabb and Schneiderman cases to mention but a few and how the Justices voted on these and other challenging issues. The 275-page documented book is a veritable cascade of pithy observations and historic in-

Social Highlights

Junior Beer Party

On Saturday evening, the 21st of April, 1951, the Junior Class will hold a beer party and dance at the Maxwell Post on Ferry near Grant. Lou Del Catto will furnish music for dancing pleasure and beer in inexhaustible quantities will be served for drinking pleasure.

The faculty has been invited to join the Junior Class in the evening's festivities. During the course of the evening toasts will be drunk to the victor of the late election to the Board of Managers, Marvin Marcus, and to "senator" Dave Mahony.

The price is low; the pleasure afforded out of all proportion to the cost.

John Olzewski and Morris Galperin will accept payment of assessments immediately.

Junior Prom

The annual Junior Prom of the University of Buffalo was held Saturday, March 10th at Kleinhans Music Hall. The prom was the largest in the history of the school. Phyllis Hubbard, a member of the Junior class of the Law School was chosen as attendant to the Prom Queen. She also was elected to Cap and Gown, the honorary women's society of the University. Ed Spector, Tom Troy and Bob Fleming were elected to Bisonhead, the men's honorary society. The members of both Bisonhead and Cap and Gown are chosen on the basis of leadership and scholarship. CONGRATULATIONS!

sights into the judicial process, and an appraisal of the Court's judicial decisions on such pertinent issues as: civil liberties, the embrace of the commerce clause, the war powers of Congress, etc., and such highly controversial subjects as the Japanese relocation movement; the Nuremberg trials, and the war trial of General Yamashita.

At the outset one will recognize that any such book which attempts to present such a plethora of information, especially as to the effect of judicial decisions, must of necessity give a summary treatment. The author surprisingly enough seems to have the knack of presenting the essentials without apparent distortion or noticeable bias. To the curious, the book will serve as a stimulant and a guide for further study. The book will undoubtedly serve as a means of enjoyable review for those who have a background in constitutional law and a welcomed introduction to those who have not as yet been initiated into this most exciting of fields. For pleasant profitable reading it is highly recommended.

The spring offensive for many millions will begin when the umpire cries, "Play Ball."

Preventive Medicine Section 973

By JACK GELLMAN
District Attorney, Niagara County
With gambling becoming one of the nationwide illegal business operations, it is more important than ever that every section of the Penal Law be closely scrutinized to assist law enforcement agencies in the stamping out of this vicious racket.

Section 973 of the New York Penal Law makes it a misdemeanor for anyone to knowingly and willfully allow gambling to exist on any premises of which he is the owner or agent. The landlord who is aware that such practices take place on his premises, and permits it to continue, shall be placed in the same category as the petty racketeer who physically operates the establishment. In Niagara County, in the month of January, we served a letter on the landlords of known gambling establishments that had existed in the past. This letter explained Section 973 of the Penal Law, and in addition, brought to the attention of the landlord all prior convictions that pertained to his premises. He was further advised that if there should be a subsequent conviction, the landlord, as well as the gambler, would be prosecuted.

Many of the landlords were honest businessmen, and had only leased the premises because of the additional rent that they might be able to charge because gambling operations existed there. When they realized that they themselves became subject to prosecution, in almost every instance they immediately served eviction notices on their tenants, forcing them to move out.

Naturally, there are certain bookmakers who have succeeded in purchasing their own property. You might ask how Section 973 affects them. In the past, where an arrest had been made, the real party in interest would merely have one of his workers enter a plea of guilty, and would not come into court himself. Consequently, some of these gambling landlords have never been found guilty, although in fact they are the real operators. By invoking Section 973 we get a double shot at that gambling establishment. Even though attempts to put up a dummy to take the punishment, the owner himself is subject to further prosecution for allowing gambling to exist on his premises.

This section has almost entirely eliminated gambling at the present time in the County of Niagara, and it would seem that if a constant vigil is kept, it could eliminate any future gambling operations.

Invoking this section of the law is our method of using preventive medicine in the elimination of one of the most cancerous conditions that exists in the country today.

O'Shea Wounded

LT. EDWARD K. O'SHEA, JR., (Class of 1951) Co. C-7th Regiment, 1st Marine Div. was recalled to active duty in October, 1950. After training at Quantico, Virginia, Lt. O'Shea was assigned as a replacement officer and left the States on January 26, 1951, Destination: Korea.

In the bitter action around Chongchon, a mortar shell burst about 5 feet from O'Shea, dealing him severe wounds about the face and the body. He was evacuated to Taegu for surgery and then to Japan. This information was conveyed to the law school in a letter from O'Shea dated March 22, 1951.

Lt. O'Shea is the head of a family of four, including his wife Hallie, and 2 children, a boy age 3 and a girl 8 months old. He attended St. Joe's and has a B. A. from the University of North Carolina. O'Shea was the first Business Manager of the Opinion.

Jackson to Speak

Through the courtesy of Mrs. James McCormick Mitchell, a fund has been set up in honor of her husband, James McCormick Mitchell, to enable the student body of law school to hear a prominent lecturer each year. The first speaker we will have the pleasure of hearing is Justice Jackson of the Supreme Court of the United States. Following the speech on May 9, there will be a social hour in the Bar Association Rooms. Chairman of the committee handling the arrangements is Bob Fleming. Serving on the committee will be: John Kelly, Mary Davey, George Kassman, Dave Risman, John Krull, and Ralph Halpern.

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Barrister's Ball

On Saturday, March 31st, amid the flashing of camera lights and the noise of raucous laughter intermingled with tinkling glasses, the 1951 Barrister's Ball moved to a crashing climax.

Despite the fact that many of the 180 couples that attended had difficulty in applying their legal training to map-reading, the majority of participants reached the Brookfield Country Club within a reasonable time.

The faculty attendance was heartening and their company well appreciated by those who established rapport with them.

At 2 a. m. Jay Maran and his Orchestra concluded their playing which by general consensus was highly satisfactory.

Mike Bellewech and his committee, who were responsible for the organization of the Ball, are to be highly commended for the successful effort they put forth to make the function the object d'art that it was.

Blood is thicker than water and relatives are continually punching each other on the nose to prove it.

If you think money doesn't talk, just try to telephone (without a dime).

Many people have a good aim in life, but too few of them know when to pull the trigger.

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Rose Receives Signal Honor

The appointment of Henry Rose to the position of Teaching Fellow at Northwestern University School of Law for the academic year beginning in September has just been announced. The appointment culminates a successful and distinguished college career. A Navy veteran, Henry Rose obtained his bachelor's degree from the University of Buffalo under the combined curriculum program. While on campus he was elected to the Board of Managers, was president of the Hillel Foundation and was a member of Beta Sigma Rho fraternity. At present he is the vice-president of the student council having been a member of that body for the past three years. He is also an associate editor of the Buffalo Law Review.

Among the student body, Mr. Rose is probably best known for the profitable operation and management of the Student Bookstore, the success of which has resulted in the establishment of, among other things, moot court prizes and a student's small loan fund.

Many a man's nose is kept on the grindstone so his wife can turn hers up at the neighbors.

We have learned by this time that you can't clean up the world with soft soap—it takes grit.

The person who lives in the past or future can't do justice to the present.

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Jury System

(Continued from Page One)

days when civil verdicts required unanimity, with a juror who refused for many hours, to join in a verdict for the holder of a promissory note. This determined citizen had somehow gotten the idea that such a note was unenforceable unless made payable at a bank, a contention advanced by no party or witness, and unmentioned in the court's charge. But he stoutly maintained the correctness of his proposition until worn down by the other eleven good men and true.

Benefit of a

Less-Than-Unanimous Verdict

A lot of the difficulties which used to arise from the presence on the jury of a crackpot or two have, of course, disappeared with the authorization, in our State in civil cases, of less-than-unanimous verdicts. So it came as somewhat of a surprise when I heard my honored friend Judge Harold Medina, at the 1951 New York State Bar Association dinner, announce, somewhat cryptically and without specifications, that he was strongly opposed to 10-vote verdicts. We will await, with interest, his promised bill of particulars, but, in the meantime the change has made it impossible for one Gromyko-type "agin the government" juror to revel in the free, proud and irrational use of his individual veto.

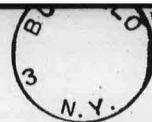
One more illustration from my lawyer days. I was representing a defendant alleged to have so negligently used a blow-torch, in repairing an old wooden steamer lying at a Buffalo dock, as to have caused the ancient hulk to burn to the water's edge. Negligence was in dispute, and the value of the craft much more so, our theory being that, if we had indeed caused the fire, we had thereby done a service to the merchant marine in ridding it of this rotting antique. The owner, on the other hand, described his ship as a trim, handsomely appointed queen of the inland seas. Taking the stand as a witness on his own behalf, the plaintiff, questioned as to value, named, without a blush, a figure probably three times as high as he ever hoped to get. One of the jurors in the front row of the box thereupon, with much ostentation, drew a pencil and a note book from his pocket, and, as everyone in

the courtroom watched, carefully wrote into the book, what must have been the plaintiff's figure just testified to, and then, slowly and dramatically, snapped the book shut, returned it to his pocket, and looked up at the clock, with a yawn. The trial had not been on for more than five minutes, but it was all over for one juror.

Such instances are available in wholesale quantities, but they prove no more than that the man or woman who takes a seat in a jurybox, does not, thereby and automatically, take on the character of a "Daniel come to judgment!" But the prejudices, the social, environmental and other biases, the generosity and the stinginess, the credulities and the cynicisms, the nobility and the baseness, of the twelve, tend to cancel each other out, just as they do in any other board or committee or congress. What results is a consensus representing, roughly but as near as we can get at it, the community opinion on the rights and wrongs of the particular dispute. No one is so naive as to think that jurors use the methodology of scientists. But democracy is not scientific or perfectionist. Democracy is self-government of the weak and the strong by the learned and the stupid, of the wise and the virtuous, by the dull and the wicked, of all by all. Democracy is based not on a childlike belief in the wisdom and goodness of the multitude, but on the idea that it is in the end better that the multitude govern itself, inefficiently and clumsily, than that a man on horseback do it for them with heartless skill.

Jury Trials Are Worth Preserving

Jury trials are expensive and over-lengthy. In jury trials lawyers are prone to obfuscate and obscure, wheedle and flatter the jurors, to lay smoke-screens and becloud the issues. Jurors complain of wasted time, of hanging-around and waiting, of poor pay. Risk and modern and business-like a jury trial is not. Are the verdicts sound? Some of them certainly are not. But the system has in general, the approval of the people who know most about



*Law Library, 4. of Miami Law School
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Marcus Elected to Board of Managers

Marvin M. Marcus of the Junior class has been elected Law School representative on the Board of Managers for the coming year. He will succeed Tom Troy who graduates this year.

The election, which was held on Wednesday, March 14, brought out one of the largest votes in the Law School's history. The Freshmen candidates, Norm Kuennel, Shelly Hurwitz, and Bob Gottesman, withdrew from the race to put their support behind Freshman Charles Desmond.

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